87-1690

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

BECHTEL POWER CORPORATION,
Petitioner,

VS.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 57, JAMES K. HOUSEKEEPER and JAY E. TRINNAMAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether state law, which seeks to regulate conduct outside traditional state police power concerns, is preempted by section 301 where (1) the state law impinges on traditional labor concerns entrusted to bargaining and (2) the state regulation does not advance a paramount state interest.

LIST OF PARTIES AND RULE 28.1 STATEMENT

The names of the parties to this proceeding are those contained in the caption of this case, with the addition of Ronald Weatherred as a Petitioner. In addition, during the time period material to this case, Bechtel Power Corporation was one of Bechtel Group, Inc.'s wholly owned subsidiaries.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Bechtel Power Corporation and Ronald Weatherred (hereunder collectively referred to as "Petitioner" or "Bechtel") respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 834 F.2d 884, and is reproduced in Appendix A, *infra,* A-1—A-11. The opinion and order of the District Court is unreported and is reproduced in Appendix B, *infra,* B-1—B-2.

JURISDICTION

The initial decision of the court below was issued on December 7, 1987. Petitioner filed a timely petition for rehearing and

suggestion of rehearing en banc on December 17, 1987, which was denied by the Court of Appeals in an order dated January 7, 1988 which is reproduced in Appendix C, *infra*, C-1. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes are set forth in Appendix D, *infra*, D-1—D-3.

STATEMENT OF THE CASE

The dispute underlying this action involves an issue of interpretation of a provision of a validly negotiated collective bargaining agreement. This collective bargaining agreement between Bechtel and respondent Local 57, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (hereinafter "Local 57"), included a term which sought to encourage labor stability in the work force. Under the provision of the labor agreement, a craftsman who terminated his employment on the project consented to a thirty-day wait before he or she could be employed by another contractor on the project. This rule was known as "the thirty-day wait" rule.

The dispute arose when Bechtel applied this work rule to craftsmen discharged for cause as well as voluntary quits. Local 57, which believed the work rule only covered voluntary quits, filed an untimely grievance under the mandatory grievance provision of the collective bargaining agreement. After the grievance was unsuccessful, Local 57 filed this action in Utah state court, alleging that Bechtel and its labor manager's actions violated two articles of the Utah Constitution and two criminal statutes of the Utah Code prohibiting "blacklisting" of employees. Bechtel timely removed the action to district court, which granted Bechtel's motion to dismiss the complaint.

The court of appeals subsequently held this action was not removable because section 301 did not preempt the Utah Constitution and statutes. The court reasoned that the rights asserted by respondents are founded upon Utah law and that parties to a collective bargaining agreement may not contract for anything which is illegal under state law. The court held that the Utah state

law rights were "non-negotiable" and did not engage in an analysis of whether the state law impinged on labor law concerns.

A. The Facts

The Intermountain Power Project (hereinafter "the Project") is a large scale power plant project which is located in Delta, Utah, a remote desert region. Bechtel contracted with the Project's owner to serve as construction manager, and was responsible for managing and coordinating contractors' work "to insure that the Project is constructed in an economic, expeditious manner without disruptions."

Bechtel entered into a collective bargaining agreement, known as the Stabilization Agreement and Project Work Rules (hereinafter "the collective bargaining agreement") with the National Building Trades Department, the Building and Construction Trades Council and all international and local unions, including Local 57, whose craftsmen worked on the project. Like most labor agreements, this contract contained a broad management rights clause granting each of the craftsmen contractors on the project "full and exclusive authority for its operations" including the right to the "selection and hiring of all personnel . . . and discharge of employees."

The collective bargaining agreement also contained the work rule which is at the heart of this action. Article VI, entitled "Payment of Wages—Checking In and Out," reads in relevant part:

> When an employee is discharged, he shall be paid his wages in accordance with the Project policy. If the employee voluntarily quits his Employer, he shall be paid the wages due him on the next regular pay day. An employee who voluntarily quits will not be rehired on the Project for a period of at least thirty (30) days.

The thirty-day wait rule is essential for a project the size and magnitude of the Project, which is faced with a limited imported workforce in a remote desert region. By its terms, the work rule limits the ability of craftsmen to jump from contractor to contrac-

tor whenever another on-site employer offers more attractive terms.

When Bechtel interpreted the work rule to apply to discharged employees, Local 57 attempted to grieve this interpretation of the contract. Local 57's attempt failed. Following the next application of the rule to discharged employees, Local 57 and two discharged employees filed this action in Utah state court.

B. The Federal Court Proceedings

Bechtel timely removed Local 57's complaint to the United States District Court for the District of Utah.[1] On May 24, 1985, the district court held that removal was proper. The court concluded that the complaint stated a federal claim arising under section 301 and granted Bechtel's motion to dismiss and provided Local 57 with leave to amend. Local 57 chose not to amend and timely filed an appeal.

The Court of Appeals for the Tenth Circuit reversed the district court. The Tenth Circuit found that Local 57 was only asserting rights based on state law and these rights were "non-negotiable" under *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202

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[1] Although the Complaint filed in Utah state court did not attack the collective bargaining agreement, the face of the complaint referred to the negotiated work rule:

> 5. As Project Manager, Bechtel requires every employer and subcontractor performing work at the Intermountain Power Plant to enforce certain "work rules" which have been promulgated by Bechtel.
>
> 6. As a "work rule" Bechtel forbids any employer on the Intermountain Power Project to employ any member of a Union at the project who has been discharged by any other employer at the project for a period of thirty (30) days commencing from the date of discharge of said member from the original employer (hereinafter "30 day discharge rule").
>
> (Complaint, Appendix E)

The only work rules in force at the Project are those contained in the collective bargaining agreement.

(1985). Since these rights were non-negotiable, the court held that section 301 did not preempt the state court action.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit decision is in conflict with Supreme Court and court of appeals' decisions concerning the scope of section 301 actions. It also aptly illustrates the confusion that the lower courts have had in interpreting the Court's pronouncements on the role of state law in setting standards for labor agreements. According to the court of appeals' decision herein, virtually any state law which proscribes any conduct confers "non-negotiable" rights on employees which cannot be altered or modified by their majority bargaining representative. The scope of this decision is overwhelming. It permits states to frustrate labor law concerns, as in this case, by declaring illegal any conduct which offends their particular notion of public policy, regardless of its impact on federal labor law concerns.

The Court of Appeals Decided Important Federal Questions Relating to Removal Jurisdiction and Section 301 of the Labor Management Relations Act in a Way Which Conflicts with Applicable Decisions of This Court and Other Federal Courts of Appeal

1. The Tenth Circuit Opinion Conflicts with Authority from Other Circuits

The question of the extent to which state regulation can control federal labor concerns is one which has vexed the lower courts and produced sharp differences of opinion. The Fourth Circuit, in sharp contrast to the decision below, held that blacklisting common law claims were preempted under the Railway Labor Act.[2]

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[2] *Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161 (4th Cir.) *cert. denied* 474 U.S. 946 (1985); *See also Hull v. Central Transport, Inc.*, 628 F.Supp. 784 (N.D. Ind. 1986) (holding Indiana's blacklisting statute preempted by section 301). *Campbell v. McLean Trucking Co.*, 592 F.Supp 1560 (E.D.N.Y. 1984) (holding that common law claim for blacklisting is preempted by section 301).

2. The Tenth Circuit's Opinion Runs Contrary to This Court's Decision in *Metropolitan Life*

This Court's review is also warranted because the court below overlooked decisions of this Court which run contrary to the court of appeals' result in this case. As a threshold matter, the court below failed to consider this Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). In *Metropolitan Life*, this Court held that while federal labor law does not preempt paramount state interests which are peripheral to federal labor law concerns, such interests must not conflict with the overall scheme of federal labor law regulation.

Metropolitan Life aptly illustrated this point. There, Massachusetts adopted a statute which required that employers provide certain minimal mental health coverage to employees if employers decided to furnish their employees with health insurance. This legislation, which the Court noted was not uncommon because states have regulated substantive terms of insurance for thirty years, "was designed to address problems encountered in treating mental illness in Massachusetts." 471 U.S. at 731. The Massachusetts courts held the provision was not preempted under either ERISA or the NLRA and the Supreme Court affirmed the judgment on appeal.

Turning to NLRA preemption, the Court observed that the Massachusetts provision did not "alter[ ] the balance of power between parties to the labor contract." 471 U.S. at 751. The Court reasoned that parties were not required to include such insurance in the collective bargaining agreement. If the parties decided not to include such insurance as a fringe benefit, the Massachusetts statute did not require any action. 471 U.S. at 748. The Court then examined the structure of the Act and determined that the purpose and intent of the Massachusetts statute was not "incompatible with these general goals of the NLRA." 471 U.S. at 754-55. The Court observed that the standard applied uniformly to all employees and did not conflict directly "with the general legislative goals of the NLRA." 471 U.S. at 757.

Thus, a plaintiff seeking to avoid preemption may not simply identify positive state law which sets a standard of conduct to

avoid preemption; he or she must also demonstrate that the state standard does not interfere with federal labor concerns. The lower courts have applied this analysis to strike down state statutes which prohibit certain conduct and are neutral on their face, but which interfere with the policies and goals of federal labor laws. *See, e.g., National Metalcrafters v. McNeil*, 784 F.2d 817 (7th Cir. 1986) (holding Illinois wage statute which mandated payment of vacation pay [contained in terms of collective bargaining agreement] to strikers could not be saved under *Metropolitan Life* analysis and was preempted); *Bechtel Construction, Inc. v. United Brotherhood of Carpenters and Joiners of America*, 812 F.2d 1220, 1225-26 (9th Cir. 1987) (holding that California's attempt to dictate minimum wages for apprentices under authority derived from National Apprenticeship Act preempted by National Labor Relations Act because "such standards can sometimes have a serious effect on the collective bargaining process") *United Steelworkers of America v. Johnson*, 799 F.2d 402 (8th Cir.), *reh'g granted*, 804 F.2d 440 (1986), *aff'd*, 830 F.2d 924 (1987) (holding that state department of labor was preempted from interpreting unemployment compensation statutes to provide benefits to strikers if the strike is caused by employer's lock-out).

In all of these decisions, courts were faced with facially neutral state statutes, like Utah's anti-blacklisting statute, which attempted to regulate behavior of parties independent of any collective bargaining relationship. These courts nevertheless analyzed the statutes under *Metropolitan Life* and found that the state interest was preempted because it impermissibly interfered with federal labor concerns.

The decision of the Tenth Circuit on its face adds a new gloss to this case law which could prove disastrous to federal labor policy. Under the Tenth Circuit's analysis, *any* state law which proscribes conduct grants non-negotiable rights to employees. That analysis directly contradicts this Court's precedent, including *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1959).

3. The Tenth Circuit's Decision Ignores the Strong Federal Policy In Favor of Resolving Disputes Through the Mandatory Grievance Procedure

The Tenth Circuit's decision also conflicts with this Court's decisions emphasizing the strong federal policy in support of the mandatory grievance procedure contained in collective bargaining agreements. *See, e.g., Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). Here the union was attempting a virtual end run around the mandatory grievance procedure.

In *United Paperworkers v. Misco, Inc.*, 108 S.Ct. 364 (1987), this Court recently reaffirmed the importance of the collective bargaining procedure. In reversing the lower court's ruling, which had refused to enforce an arbitrator's decision sustaining a discharged employee's grievance on the ground that the employee had violated Louisiana state law against the possession and sale of narcotics, the Supreme Court observed that collective bargaining agreements would be gutted if courts were free to impose their own sense of "public policy" derived from state law.[3]

When this case law is applied to the instant case, the Utah statute fails because it attempts to proscribe a critical subject of collective bargaining which federal labor policy has long shielded: how union employees may be dispatched and removed from a job site. Utah is also attempting to interject iteslf into the interpretation of the collective bargaining agreement. By necessity, if this case proceeds in Utah state court, the union plaintiffs will have to prove in their case in chief that the provision of the collective bargaining agreement at issue in this case does not apply to

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[3] In light of the procedural setting of this case, *Misco* also virtually mandates rehearing. As noted above, Local 57 initially attempted to grieve this issue under the collective bargaining agreement. At oral argument on May 21, 1987, Local 57's counsel conceded that the union's prior attorney believed that the issue was arbitrable under the agreement and should be resolved in that fashion. In the event that the arbitrator had decided the issue raised in this lawsuit in Bechtel's favor, *Misco* would prohibit Utah state courts, as well as a federal district court, from setting aside the arbitration decision on the ground that it violated Utah's public policy.

persons discharged for cause. The union has no complaint over "blacklisting" for thirty-day voluntary quits.

The fact that the Utah statute is a penal statute sheds no light on this issue. Every state has penal statutes which could be applied to frustrate federal labor policy. In this regard, Utah's interest is no different than Ohio's strong interest, as expressed in its antitrust laws, against anti-competitive practices, *e.g., Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1959) or California's compelling interest in insuring that state indentured apprentices are not exploited. *E.g., Bechtel Construction, Inc. v. United Brotherhood of Carpenters and Joiners of America*, 812 F.2d 1220 (9th Cir. 1987). For this reason, every federal court which has considered the question has held that state blacklisting statutes or common law blacklisting claims are preempted by section 301. *See, e.g., Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Hull v. Central Transport, Inc.*, 628 F.Supp. 784 (N.D. Ind. 1986) (holding Indiana's blacklisting statute preempted by section 301); *Campbell v. McLean Trucking Co.*, 592 F.Supp. 1560 (E.D.N.Y. 1984).

4. The Tenth Circuit's Decision Raises Important Issues Similar to Those Raised in *Lingle v. Norge Division of Magic Chef, Inc.*

Finally, the Tenth Circuit's rationale, expressed in footnote 6 (Appendix A, *infra*, A-9) that "in the case before us . . . the collective bargaining agreement grants no rights to discharged employees like Housekeeper and Trinnaman comparable to those they seek to vindicate in this lawsuit" is also flawed. Indeed, this issue of the availability of greater remedies under state law as a factor in the preemption analysis is presently before the Court in *Lingle v. Norge Division of Magic Chef, Inc.*, No. 87-259. In *Lingle*, the Seventh Circuit observed that "We do not believe that the mere availability of punitive damages in state court should prevent preemption." 823 F.2d 1031, 1046 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 226 (1987). In all events, the claim raised by respondents does depend upon an analysis of the terms of the collective bargaining agreement.

CONCLUSION

For all of the foregoing reasons, a petition of certiorari should issue.

Dated: April 5, 1988

Respectfully submitted,

PHILIP R. PLACIER
Counsel of Record

APPENDIX A

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Number 57, James K. Housekeeper and Jay E. Trinnaman, Plaintiffs-Appellants,

v.

Bechtel Power Corporation and Ronald Weatherred, Defendants-Appellees.

No. 85-1933.

United States Court of Appeals, Tenth Circuit.

Dec. 7, 1987.

Rehearing Denied Jan. 7, 1988.

Before LOGAN, SEYMOUR, and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge.

Plaintiffs filed this action in a state district court in Utah, alleging that defendants had blacklisted workers at the Intermountain Power Project (the project) in Millard County, Utah, in violation of various provisions of the Utah Constitution and Utah statutes. Defendants removed the case to the United States District Court for the District of Utah, asserting jurisdiction under 28 U.S.C. § 1331 because plaintiffs' claim arose under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. Defendants then moved for dismissal on the grounds that (1) plaintiffs had failed to exhaust grievance procedures specified by a collective bargaining agreement in force at the project, and (2) the challenged conduct related to a mandatory subject of collective bargaining and was therefore protected by § 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158.

The district court denied plaintiffs' motion to remand for lack of subject matter jurisdiction and, after plaintiffs declined an opportunity to amend their complaint, dismissed the action with prejudice. On appeal, we must consider first whether the district

court had jurisdiction under 28 U.S.C. §§ 1331 and 1441. Because we conclude that the district court lacked jurisdiction, we need not consider the other issues raised in the appeal.

Plaintiffs James K. Housekeeper and Jay E. Trinnaman were discharged from employment by B & W Construction Company, a subcontractor at the project. Their complaint alleges that defendant Bechtel Power Corporation (Bechtel), the construction manager at the project, and defendant Ronald Weatherred, a Bechtel employee, prevented plaintiffs from obtaining reemployment at the project by imposing a "work rule" upon all other contractors there. This rule prohibits the contractors from hiring any employee discharged by another employer at the project for thirty days after the discharge.[1] Plaintiffs assert that enforcement of the "30 day discharge rule," including the promulgation and exchange among employers at the project of lists of employees subject to the rule, constitutes blacklisting in violation of article XII, § 19 and article XVI, § 4 of the Constitution of Utah, and Utah Code Ann. § 34-24-1.[2]

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[1] Article VI, § 4 of the Stabilization Agreement and Project Work Rules, the collective bargaining agreement governing the terms of the individual plaintiffs' employment at the project, provides:

> "When an employee is discharged, he shall be paid his wages in accordance with the Project policy. If the employee voluntarily quits his Employer, he shall be paid the wages due him on the next regular payday. *An employee who voluntarily quits will not be rehired on the Project for a period of at least thirty (30) days.*" I.R. 22 (emphasis added). Bechtel construes the final sentence of this provision as encompassing employees who, like Housekeeper and Trinnaman, have been discharged "for cause" by their employers. Plaintiffs, however, maintain that the "30 day discharge rule," as applied to the individual plaintiffs, is not a part of the collective bargaining agreement.

[2] Those provisions are as follows:

> "[Blacklisting forbidden.]
>
> Every person in this State shall be free to obtain employment whenever possible, and any person, corporation, or agent, servant or employee thereof, maliciously interfering or hindering in any way, any person from obtaining or enjoying employment already ob-

When an action "arising under the Constitution, laws, or treaties of the United States" is commenced in state court, the defendant or defendants may remove it to the federal district court for the district in which the action is pending. 28 U.S.C. §§ 1331, 1441(a), (b). The "arising under" language of § 1331 "has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts." *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 8, 103 S.Ct. 2841, 2845, 77 L.Ed.2d 420 (1983).

Two clear principles have emerged, however, which form a sufficient basis for our determination of this appeal. First, when federal law creates the cause of action, the case arises under federal law. *See id.* at 8-9, 103 S.Ct. at 2845-46; *American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916). Second, an action does not arise under federal law unless a substantial, disputed question of federal law is an essential element of the plaintiffs' well-pleaded complaint. *Franchise Tax Board,* 463 U.S. at 10-13, 103 S.Ct. at 2846-48; *Gully v. First National Bank in Meridian,* 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936).

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tained, from any other corporation or person, shall be deemed guilty of a crime. The Legislature shall provide by law for the enforcement of this section."

Utah Const. art. XII, § 19.

"[Exchange of blacklists prohibited.]

The exchange of blacklists by railroad companies, or other corporations, associations or persons is prohibited."

Id. art. XVI, § 4.

"Blacklisting of employees prohibited.—No person shall blacklist or publish, or cause to be published or blacklisted, any employee discharged or voluntarily leaving the service of any person, company or corporation with intent and for the purpose of preventing such employee from engaging in or securing similar or other employment from any other person, company or corporation."
Utah Code Ann. § 34-24-1.

In addition, Utah Code Ann. § 34-24-2 imposes criminal penalties on employers engaging in blacklisting practices forbidden by § 34-24-1.

The well-pleaded complaint rule applies even when "both parties admit that the only question for decision is raised by a federal pre-emption defense." *Franchise Tax Board,* 463 U.S. at 12, 103 S.Ct. at 2848. Despite this, a complaint purporting to rely entirely on state-created rights and remedies sometimes may be deemed to have stated a cause of action arising under federal law. "[I]f a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Id.* at 24, 103 S.Ct. at 2854. Thus, in *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), the Supreme Court held that because suits for violation of collective bargaining agreements are to be governed entirely by federal law pursuant to LMRA § 301, *see Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456-57, 77 S.Ct. 912, 917-18, 1 L.Ed.2d 972 (1957), a suit brought in state court to enjoin a union and its members from violating a "no-strike" clause in such an agreement was removable to federal court, notwithstanding the petitioner's reliance on state law. *Avco,* 390 U.S. at 560, 88 S.Ct. at 1237.

Defendants in the instant case argue that because plaintiffs' state law claims "concern a matter [the 30 day rule] addressed by the collective bargaining agreement," they are preempted by § 301 of the LMRA, and the action is therefore one arising under federal law.

In analyzing this issue, we first delineate the two types of federal labor law preemption. The first type, which is not involved at this stage of the appeal, arises under §§ 7 and 8 of the NLRA. Sections 7 and 8 do not confer original federal court jurisdiction over actions within its scope; they confer jurisdiction in the first instance upon the National Labor Relations Board (NLRB).

Under principles announced in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), both state and federal courts generally lack original jurisdiction to determine disputes involving conduct actually or arguably prohibited or protected by the NLRA. *Id.* at 244-45, 79 S.Ct. at 779-80; *Belknap, Inc. v. Hale,* 463 U.S. 491, 498, 103 S.Ct. 3172, 3177, 77 L.Ed.2d 798 (1983); *see also Viestenz v.*

Fleming Cos., 681 F.2d 699, 702 (10th Cir.), *cert. denied*, 459 U.S. 972, 103 S.Ct. 303, 74 L.Ed.2d 284 (1982). The Supreme Court has considered it essential to the administration of the NLRA that determinations regarding the scope and effect of §§ 7 and 8 "be left in the first instance to the National Labor Relations Board." *Garmon*, 359 U.S. at 244-45, 79 S.Ct. at 779-80.

The *Garmon* doctrine does not, however, preempt all local regulation that in any way touches or concerns the employment relationship. *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 295-96, 97 S.Ct. 1056, 1060-61, 51 L.Ed.2d 338 (1977). The Supreme Court has refused to prohibit state regulation otherwise within the scope of *Garmon* when the conduct at issue is of only peripheral concern to the NLRA or touches interests deeply rooted in local feeling and responsibility. *Id.* at 296-97, 97 S.Ct. at 1061-62; *Belknap*, 463 U.S. at 498, 103 S.Ct. at 3177.

> "In such cases, the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act, and the risk that the State will sanction conduct that the Act protects."

Belknap, 463 U.S. at 498-99, 103 S.Ct. at 3177 (citations omitted); *see also Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) (discussing separate considerations underlying arguably prohibited and arguably protected branches of *Garmon* doctrine).[3]

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[3] State causes of action relating to conduct that the NLRA neither protects nor prohibits may also be substantively preempted when "it is determined that Congress intended the conduct to be unregulated and left to the free play of economic forces." *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 676 n. 8, 103 S.Ct. 1453, 1459 n. 8, 75 L.Ed.2d 368 (1983) (citing *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140, 96 S.Ct. 2548, 2553, 49 L.Ed.2d 396 (1976)). In such cases, the NLRB's exclusive jurisdiction is not at issue, and the preemption question must be determined in the

In cases in which preemption under the NLRA does not automatically deprive both state and federal courts of jurisdiction in favor of the jurisdiction of the NLRB, such preemption is simply a defense to state law claims touching on areas covered by the federal enactment. *See Sears,* 436 U.S. at 205, 98 S.Ct. at 1761 (permitting state court to "evaluate the merits of an argument that certain trespassory activity is protected" by NLRA § 7). As a defense, it cannot confer jurisdiction on the federal courts. " '[A] suit brought upon a state statute does not arise under an act of Congress . . . because prohibited thereby.' " *Franchise Tax Board,* 463 U.S. at 12, 103 S.Ct. at 2848 (quoting *Gully,* 299 U.S. at 116, 57 S.Ct. at 99). Thus, preemption under NLRA §§ 7 or 8 provides no basis for removal of the instant case to the federal court.

The second type of labor law preemption, which is involved here, concerns § 301 of the LMRA. Section 301 vests concurrent jurisdiction in state and federal courts over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185(a); *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962). The federal district courts have jurisdiction over such suits even if the contractual violation is also an unfair labor practice within the NLRB's jurisdiction. *Farmer,* 430 U.S. at 297 n. 8, 97 S.Ct. at 1062 n. 8.

Therefore, to determine whether the federal district court had jurisdiction in this case, we must determine whether plaintiffs' complaint essentially alleges a violation of the collective bargaining agreement in force at the Intermountain project. If so, LMRA § 301 controls, and "the balancing of state and federal interests required by *Garmon* pre-emption is irrelevant since Congress, acting within its power under the Commerce Clause, has provided that federal law must prevail," *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 214 n. 9, 105 S.Ct. 1904, 1912 n. 9, 85 L.Ed.2d 206 (1985). The case would then be removable.

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first instance by the courts. *Sears,* 436 U.S. at 199 n. 30, 98 S.Ct. at 1759.

Plaintiffs have often attempted to avoid federal jurisdiction under § 301 by framing their complaints in terms of such diverse state law theories as wrongful discharge, intentional infliction of emotional distress, conspiracy, and misrepresentation. *See, e.g., Oglesby v. RCA Corp.*, 752 F.2d 272, 276-78 (7th Cir.1985); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F2d 1468 (9th Cir.1984); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir.1980). Under the "artful pleading" doctrine, federal courts look beyond the allegations of the complaint, often to the petition for removal, to determine whether the wrong complained of actually arises in some manner from a breach of the defendants' obligations under a collective bargaining agreement. *See Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 931 & n. 1 (9th Cir.), *aff'd*, ____ U.S. ____, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); *Oglesby*, 752 F.2d at 278; *Fristoe*, 615 F.2d at 1212. If the courts find it to be such a case, the complaint is recharacterized as one arising under § 301, to which federal substantive law applies. *Olguin*, 740 F.2d at 1472.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), the United States Supreme Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," the claim is preempted by § 301. *Id.* at 220, 105 S.Ct. at 1916. Specifically, it held that § 301 preempted a state law tort action for bad-faith delay in making disability-benefit payments due under a collective bargaining agreement.[4] The Court noted that the need for uniform interpretation of collective bargaining contracts necessitates some

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[4] *Allis-Chalmers* was decided on certiorari to the Wisconsin Supreme Court; it did not involve the issue of federal removal jurisdiction. But the Supreme Court applied the principles announced in *Allis-Chalmers* in *International Brotherhood of Elec. Workers v. Hechler*, ____ U.S. ____, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987), to determine that the district court had removal jurisdiction, under 27 U.S.C. § 1441 and LMRA § 301, over a state law tort claim that a union had breached its duty of care to provide a union member with a safe workplace because the claim necessarily rested on the union's having assumed the duty by the collective bargaining agreement. *Id.* at ____, 107 S.Ct. at 2166.

degree of federal preemption under § 301: " 'The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' " *Id.* at 210, 105 S.Ct. at 1910 (quoting *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04, 82 S.Ct. 571, 576-77, 7 L.Ed.2d 593 (1962)). Therefore, the Court concluded,

> "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort."

Id. at 211, 105 S.Ct. at 1911.

Noting that not every dispute touching a provision of a collective bargaining agreement is preempted by § 301, the Court in *Allis-Chalmers* drew a distinction between aspects of the employment relationship that are within and without the scope of that section:

> "Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. *Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.* In extending the pre-emptive effect of § 301 beyond suits for breach of contract, *it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.*
>
> Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private

> parties, are pre-empted by those agreements. Our analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract."

Id. at 211-13, 105 S.Ct. at 1911-12 (footnotes and citation omitted) (emphasis added). Because the right asserted under state tort law in *Allis-Chalmers* was derived from rights established by the collective bargaining contract, and any attempt to assess liability would inevitably involve interpretation of that contract, the Court held the state tort preempted by federal law. *Id.* at 217, 218, 220, 105 S.Ct. at 1914-16.

The plaintiffs in the case before us have asserted what appears to be a novel claim under Utah law. Utah courts have not addressed whether a civil cause of action exists under the constitutional and statutory provisions quoted *supra* note 2, and, if so, what elements plaintiffs would be required to prove and what defenses might be available.[5] But if such a cause of action does exist, it is derived entirely from rights and duties created by state law and not from the terms, express or implied, of the collective bargaining agreement here invoked.[6] The Utah blacklisting laws

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[5] *But see State v. Packard,* 122 Utah 369, 250 P.2d 561, 563 (1952) (describing Article XII, § 19 as "one of the basic freedoms vouched safe [sic] by our state constitution," which "complements and makes more meaningful the other rights guaranteed as part of our constitutional liberties").

[6] When an independent state cause of action parallels rights established in a collective bargaining agreement, preemption under § 301 may be necessary to prevent the complaining party from sidestepping grievance procedures specified in the agreement. *See Strachan v. Union Oil Co.,* 768 F.2d 703, 704-05 (5th Cir.1985); *Harper v. San Diego Transit Corp.,* 764 F.2d 663, 668 (9th Cir.1985); *Vantine v. Elkhart Brass Mfg. Co.,* 762 F.2d 511, 517 (7th Cir.1985); *see also Allis-Chalmers,* 471 U.S. at 219, 105 S.Ct. at 1915 (holding that preemption of "derivative" tort claims is necessary to "preserve the central role of arbitration in our 'system of industrial self-government' "). In the case before us, however,

arguably confer "nonnegotiable state-law rights on . . . employees independent of any right established by contract." *Allis-Chalmers,* 471 U.S. at 213, 105 S.Ct. at 1912. If these rights are in fact nonnegotiable, they clearly are not preempted under *Allis-Chalmers,* because the state court can determine whether defendants have engaged in conduct prohibited by Utah law without referring to or interpreting the contract.

It is possible that a Utah court would find the collective bargaining agreement relevant to show waiver or consent as a state-law defense to plaintiffs' allegations of blacklisting.[7] If such a defense is available, one might then argue, under *Allis-Chalmers,* that plaintiffs' state law rights are negotiable, and that "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." 471 U.S. at 213, 105 S.Ct. at 1912. But the Supreme Court rejected a similar argument in *Caterpillar, Inc. v. Williams,* ____ U.S. ____, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). There, the Court said:

> "It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of

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the collective bargaining agreement grants no rights to discharged employees like Housekeeper and Trinnaman comparable to those they seek to vindicate in this lawsuit.

[7] *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of Torts* § 18, at 122-24 (1984) (discussing consent as a bar to tort actions based on criminal conduct; split of authority noted); *Restatement (Second) of Torts* § 892c (1979) (consent to criminal conduct bars recovery in tort unless plaintiff is within a class of persons intended to be protected by the criminal statute irrespective of their consent); *cf. Elkington v. Foust,* 618 P.2d 37, 40 (Utah 1980) (consent not a defense to tort action for sexually assaulting and abusing a minor, in part because "any consensual agreement to engage in such conduct would be rejected by the law as against public policy and void").

> the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal."

Id. 107 S.Ct. at 2433 (emphasis in original) (footnote omitted).

We hold that plaintiffs' blacklisting claims are not preempted by § 301 of the LMRA, and the district court therefore lacked jurisdiction under 28 U.S.C. §§ 1331 and 1441. We express no opinion concerning whether NLRA §§ 7 and 8 preempt plaintiffs' claims; these are matters to be addressed in the first instance by the Utah state courts.

REVERSED.

APPENDIX B

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In the United States District Court
for the District of Utah
No. C 85 0003 A

United Association of Journeymen and Apprentices
of the Plumbing and Pipe Fitting Industry of the
United States and Canada, Local Number 57,
James K. Housekeeper, and Jay E. Trinnaman,
Plaintiffs,

vs.

Bechtel Power Corporation and Ronald Weatherred,
Defendants.

ORDER

This matter having come regularly before the Court on Monday, March 25, 1985, at 9:00 a.m., the Honorable Aldon J. Anderson, Chief Judge, presiding, for oral argument upon Plaintiffs' Motion to Strike or Deny Defendants' Motion to Dismiss Plaintiffs' Complaint, upon Plaintiffs' Motion to Remand this proceeding to the Fourth Judicial District Court in and for Millard County, State of Utah, and upon Defendants' Motion to Dismiss Plaintiffs' Complaint. Plaintiffs were represented by at-

torney Joseph E. Tesch. Defendants were represented by attorneys Steven E. Clyde and Douglas P. Kight.

The Court, having heard the argument of counsel and being fully appraised in the premises, hereby orders:

1. That Plaintiffs' Motion to Strike or Deny Defendants' Motion to Dismiss is hereby denied.

2. That Plaintiffs' Motion to Remand this action to the Fourth Judicial District Court in and for Millard County, State of Utah, is hereby denied.

3. That Plaintiffs shall have twenty days from the date of this Order within which to amend their Complaint, and that if Plaintiffs fail to do so, the Court will grant Defendants' Motion to Dismiss Plaintiffs' Complaint with Prejudice.

Dated this 16 day of April, 1985.

UNITED STATES DISTRICT COURT

/s/ ALDON J. ANDERSON
Aldon J. Anderson
Chief Judge

APPENDIX C

November Term—January 7, 1988

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby K. Baldock, Circuit Judges.

No. 85-1933

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Number 57, James K. Housekeeper and Jay E. Trinnaman,
Plaintiffs-Appellants,

v.

Bechtel Power Corporation
and Ronald Weatherred,
Defendants-Appellees.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ ROBERT L. HOECKER, Clerk
Robert L. Hoecker, Clerk

APPENDIX D

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independant claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

(As amended Oct. 21, 1976, Pub.L. 94-583, § 6, 90 Stat. 2898; June 19, 1986, Pub.L. 99-336, § 3(a), 100 Stat. 637.)

Section 301(a) of the Labor-Management Relations Act (29 U.S.C. § 185(a)):

Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Utah Constitution, Article XVI, § 4:

Exchange of blacklists prohibited.

The exchange of blacklists by railroad companies, or other corporations, associations or persons is prohibited.

Utah Constitution, Article XII, § 19:

Blacklisting forbidden.

Every person in this State shall be free to obtain employment whenever possible, and any person, corporation, or agent, servant or employee thereof, maliciously interfering or hindering in any way, any person from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a crime. The Legislature shall provide by law for the enforcement of this section.

Utah Code § 34-24-1:

Blacklisting of employees prohibited—No person shall blacklist or publish, or cause to be published or blacklisted, any employee discharged or voluntarily leaving the service of any person, company or corporation with intent and for the purpose of preventing such employee from engaging in or securing similar or other employment from any other person, company or corporation.

Utah Code § 34-24-2:

Violation—Penalty.—If any person blacklists or publishes, or causes to be blacklisted or published, any employee discharged by any corporation, company or individual, with the intent and for the purpose of preventing such employee from engaging in or securing similar or other employment from any other corporation, company or individual, or shall in any manner conspire or contrive by correspondence or otherwise to prevent such discharged employee from securing employment, such person is guilty of a felony and shall be fined not less than $55 nor more than $100 and imprisoned in the state prison not less than sixty days nor more than one year.

APPENDIX E

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In the District Court for the
Fourth Judicial District in and for
Millard County, State of Utah

Case No. 7817

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Number 57, James K. Housekeeper and Jay E. Trinnaman,
Plaintiffs,

v.

Bechtel Power Corporation
and Ronald Weatherred,
Defendants.

COMPLAINT

COME NOW Plaintiffs by and through their attorneys, Tesch & Hufnagel, and Joseph E. Tesch, and complain against the Defendants as follows:

GENERAL ALLEGATIONS

1. Plaintiff United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Number 57 (hereinafter "Union") is a labor organization of craft workers who perform plumbing and pipe fitting services, as employees, for pay in Millard and other counties in Utah.

2. Plaintiffs James K. Housekeeper and Jay E. Trinnaman are members of the Union and have at various pertinent times been

employed by employers and subcontractors at the Intermountain Power Project and have unlawfully been denied employment by other employers as a result of the acts of Defendants which are the basis of this Complaint.

3. Defendant Bechtel Power Corporation (hereinafter "Bechtel") is a corporation doing business in Millard County. More specifically, at all pertinent times it was and is the "Construction Manager" or "Project Manager" of the construction of the generating station complex owned by the Intermountain Power Agency in the Delta City area of Millard County, Utah (hereinafter "Intermountain Power Project" or "IPP").

4. Defendant Ronald Weatherred at all pertinent times was and is employed by and as agent of Bechtel functioning in a policy-making managerial position and has personally developed and enforced the blacklisting policies, procedures and actions which are the basis of this Complaint.

5. As Project Manager, Bechtel requires every employer and subcontractor performing work at the Intermountain Power Plant to enforce certain "work rules" which have been promulgated by Bechtel.

6. As a "work rule" Bechtel forbids any employer on the Intermountain Power Project to employ any member of the Union at the project who has been discharged by any other employer at the project for a period of thirty (30) days commencing from the date of discharge of said member from the original employer (hereinafter "30 day discharge rule").

7. From November 15, 1983 to August 3, 1984, James K. Housekeeper was employed by B&W Construction Company, an employer and subcontractor, as a pipefitter at the Intermountain Power Project. On August 3, 1984, he was discharged by that employer. On August 7, 1984 he was hired by Cherne Contracting Company, also an employer and subcontractor, as a pipefitter at the Intermountain Power Project. However, he was discharged from said job on August 9, 1984 for the reason that his employment was in violation of Bechtel's 30 day discharge rule.

8. For a period prior to August 3, 1984, Jay E. Trinnaman was employed by B&W Construction Company, an employer and subcontractor, as a pipefitter at the Intermountain Power Project. On August 3, 1984 he was discharged by that employer. On August 11, 1984 he passed a weld test given by Cherne Contracting Company. However, that employer did not hire him to work on the Intermountain Power Project because of Bechtel's 30 day discharge rule.

9. Defendants Bechtel and Weatherred have informed the Union not to refer workers to employers at the Intermountain Power Project in violation of Bechtel's 30 day discharge rule as Bechtel would not allow them to be employed at the project. Similarly, Bechtel and Weatherred have informed all employers at the project that they may not hire any employee in violation of Bechtel's 30 day discharge rule. Bechtel and Weatherred, in fact, refuse to allow any employer to employ an employee at the project in violation of the 30 day discharge rule.

10. Bechtel and Weatherred and their agents publish a blacklist of all terminated employees, voluntary or discharged, noting the date of their discharge, and promulgate and exchange said list to and among all employers performing work at the project and to the Union and other unions referring workers to the project to prohibit employers from hiring and unions from referring workers in violation of Bechtel's 30 day discharge rule.

COUNT ONE

11. This count, by this reference, incorporates all of the allegations stated in paragraphs "1" through "10" above.

12. Said acts of Bechtel and Weatherred maliciously interfere or hinder the right of every person in this State to be free to obtain employment whenever possible.

13. Said acts are therefore in violation of Article XII Section 19 of the Constitution of Utah and should be enjoined.

COUNT TWO

14. This count, by this reference, incorporates all of the allegations stated in paragraphs "1" through "10" above.

15. The promulgation and exchange of the blacklists for the purpose of prohibiting employment by other employers is specifically prohibited by Article XVI Section 4 of the Constitution of Utah and should be enjoined.

COUNT THREE

16. This count, by this reference, incorporates all of the allegations stated in paragraphs "1" through "10" above.

17. The acts of blacklisting employees and publishing blacklists and causing to be published or blacklisted employees discharged or voluntarily leaving employment of one person, company or corporation were done with the intent and for the purpose of preventing such employees from engaging in or securing similar or other employment from any other person, company or corporation.

18. As such acts are specifically prohibited by Section 34-24-1, Utah Code Annotated, 1953, as amended, and should be enjoined.

19. As such acts comprise a felony in violation of Section 34-24-2, Utah Code Annotated, 1953, as amended, punitive damages should be assessed for each violation in an amount of no less than $50,000.00 for each person so blacklisted.

COUNT FOUR

20. This count, by this reference, incorporates all of the allegations stated in paragraphs "1" through "10" above.

21. The enforcement of the 30 day discharge is an unreasonable violation of Article XII Section 19 of the Constitution of Utah in that it is absolute in application to every terminated employee regardless of cause and is, therefore, unreasonable in that it is not reasonably correlated to the general welfare. As such, it should be enjoined.

WHEREFORE, Plaintiffs demand Judgment against Defendants as follows:

1. That Defendants and their agents be enjoined from enforcing their 30 day discharge rule.

2. That Defendants be enjoined from exchanging or promulgating their termination blacklists.

3. That the Defendants be enjoined from all other efforts to blacklist employees.

4. That the Defendants be assessed punitive and exemplary damages in favor of the Union for each employee blacklisted in the total amount of not less than $5,000,000.00.

5. That Plaintiffs Housekeeper and Trinnaman be awarded loss of pay and other special damages in amounts to be proven at trial.

6. That Plaintiffs Housekeeper and Trinnaman be awarded general damages in an amount of $50,000.00 each.

7. That Plaintiffs Housekeeper and Trinnaman be awarded punitive and exemplary damages in an amount of $100,000.00 each.

8. That Plaintiffs be awarded actual attorney's fees.

9. That the Court grant such other relief as appears just and equitable under the circumstances.

DATED this 30th day of November, nineteen hundred and eighty-four.

TESCH AND HUFNAGEL

/s/ JOSEPH E. TESCH
Joseph E. Tesch
Attorneys for Plaintiffs

No. 87-1690

Supreme Court, U.S.
FILED
MAY 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

BECHTEL POWER CORPORATION,

Petitioner,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 57, JAMES K. HOUSE-KEEPER AND JAY E. TRINNAMAN,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a cause of action in state court based entirely upon state prohibited blacklisting is preempted by Section 301 where the parties have executed a collective bargaining agreement in which some terms of hiring and discharge have been agreed upon.

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No. 87-1690

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

BECHTEL POWER CORPORATION,

Petitioner,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 57, JAMES K. HOUSE-KEEPER AND JAY E. TRINNAMAN,

Respondents.

—o—

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

On April 6, 1988, Petitioners Bechtel Power Corporation and Ronald Weatherred (hereinafter "Petitioners") filed for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit (hereinafter "Petition") in favor of United As-

sociation of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 57, James K. Housekeeper and Jay E. Trinnaman (hereinafter "Respondents"). This response is in opposition to the issuance of that Writ.

———o———

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 834 F.2d 884 and is reproduced on pages A-1 through A-11 of Appendix A of the Petition. The opinion and order of the District Court is unreported and is reproduced on pages B-1 through B-2 of Appendix B of the Petition.

———o———

JURISDICTION

Respondents concede jurisdiction as invoked by the Petition.

———o———

STATUTORY PROVISIONS INVOLVED

All the necessary statutory provisions for deciding this Petition are contained in pages D-1 through D-3 of Appendix D of the Petition.

———o———

STATEMENT OF THE CASE

Petitioners, as construction managers of a large scale power plant, blacklisted workers by refusing to allow independent subcontractors at the job site to hire them for thirty (30) days after they had been discharged by any other subcontractor at that site. This blacklisting was not bargained for or authorized in any labor agreement, was unrelated to any protected union activity under Section 8 of the National Labor Relations Act (NLRA), 29 U.S.C., Section 158, and was in apparent violation of certain state of Utah constitutional and statutory provisions.

Without reference to or reliance upon any rights granted under any labor agreement or protected by Section 8 of the NLRA, Respondents filed a complaint in state court alleging only violations of state of Utah laws prohibiting such blacklisting. See Petition Appendices D and E. There are no allegations in the complaint which parallel the protected or prohibited activities under the NLRA.

Petitioners removed the Complaint to federal court, alleging preemption under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C., Section 185, then moved for dismissal on the grounds that (1) Respondents failed to exhaust controlling grievance procedures, and (2) the challenged activity was a mandatory subject of collective bargaining and, therefore, protected by Section 8 of the National Labor Relations Act.

The Respondents sought remand to state court on the theory that they relied only upon causes of action grounded in state law, unrelated to any labor agreement and unrelated to any rights protected by Section 8 of the NLRA.

The United States District Court for the State of Utah denied Respondents' motion to remand, then dismissed the complaint, apparently on the theory that Respondents had failed to exhaust mandatory grievance procedures.

The Tenth Circuit reversed, holding that since the complaint relied only upon rights arguably granted and protected by state law which were not preempted by Section 301 of the LMRA, under the well-pleaded complaint rule, the district court lacked jurisdiction under 28 U.S.C., Sections 1331 and 1441. It then held that since Petitioners' claims of preemption under Sections 7 and 8 of the NLRA were raised only as a defense to the complaint, they were to be addressed in the first instance by the Utah state courts.

Petitioners request a Writ of Certiorari seeking to reverse that decision.

REASONS FOR DENYING THE WRIT

The decision of the Tenth Circuit Court of Appeals turned on the issue of whether the district court had original jurisdiction under 28 U.S.C. Sections 1331 and 1441. In ruling that the district court did not have original jurisdiction, the Tenth Circuit decided only two issues: (1) the complaint relied completely on state law and, therefore, under the well-pleaded complaint rule, no removal jurisdiction existed; and, (2) as the issue of federal preemption under NLRA, Sections 7 and 8, is raised only as

a defense to the complaint it must, therefore, be addressed in the first instance by the state court.

———o———

ARGUMENT

THE COURT OF APPEALS OPINION CONSISTENTLY AND CORRECTLY APPLIED THIS COURT'S DECISIONS ON REMOVAL JURISDICTION UNDER THE WELL-PLEADED COMPLAINT RULE.

1. The Tenth Circuit Opinion is Correct and is Not in Conflict with Authority From Other Circuits as Alleged in the Petition.

Petitioners cite only three cases allegedly in conflict with the Tenth Circuit's decision, all of which are clearly distinguishable, one of which is clearly wrongly decided.

(a) Petitioners' reliance on *Peterson v. Air Line Pilots Ass'n.*, 759 F.2d 1161 (4th Cir. 1985), *cert. denied* 474 U.S. 946 (1985), as a conflicting authority is misplaced. Peterson, a former airline pilot, sought tort damages against his union as a result of conspiracy to achieve his wrongful discharge which was motivated by Peterson's prior work as a replacement pilot during a union sponsored strike. However, Peterson's claim arose not under Sections 7 or 8 of the NLRA, or under the LMRA, but under the Railway Labor Act, 45 U.S.C., Section 151 *et seq.*, and as the Fourth Circuit noted: " . . . Preemption under the RLA has followed a similar tack [to preemption under the NLRA], but a more stringent pattern of judicial difference has emerged. . ." *Id.* at pages 1168-1169.

Furthermore, while Peterson's claims against his union for blacklisting were based upon his actions during a labor dispute paralleling rights protected by Section 8 of the NLRA, the blacklisting complained of in this case is not based upon any actions of the Petitioners arguably protected or prohibited by Sections 7 or 8 of the NLRA.

In *Campbell v. McLean Trucking Co.*, 592 F.Supp. 1560 (E.D.N.Y. 1984), the employee, as in *Peterson*, alleged blacklisting by his employer as a direct result of Campbell's involvement in an unauthorized work stoppage. As Campbell filed suit in a federal district court, no removal jurisdiction issue was presented. Furthermore, as his state blacklisting claim alleged activity clearly protected by the NLRA (a matter not present here), his claim was preempted.

Petitioners' reliance on *Hull v. Central Transport, Inc.*, 628 F.Supp. 784 (N.D. Ind. 1986), is similarly misplaced. In *Hull*, the plaintiff brought suit in state court directly alleging and relying upon a bargaining agreement, thus providing a sound basis for removal jurisdiction. Furthermore, although the court held that Hull's blacklisting allegations under Indiana state law were preempted, it did so summarily without any discussion of the issues and incorrectly relied upon *Peterson* and *Campbell, supra*, as its authority for that holding.

2. The Tenth Circuit's Opinion did not Reach Metropolitan Life and Reserved Those Issues for First Analysis by the State Court.

Petitioners argue that the Tenth Circuit failed to analyze the impact of *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). However, the Tenth Cir-

cuit's reason for not analyzing the *Metropolitan Life* issues was that the district court and, therefore, the Tenth Circuit, lacked jurisdiction under the well-pleaded complaint rule, and that since the complaint's blacklisting claims are not preempted by Section 301 of LMRA, the issue of preemption under Sections 7 and 8 of the NLRA, raised as defenses only, cannot provide a basis for removal jurisdiction, citing *Caterpillar, Inc. v. Williams*, 482 U.S. —, 96 L.Ed.2d 318, 107 S.Ct. 2425 (1987):

> "'. . . The presence of a federal question, even a Section 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. . . . But a *defendant* cannot, merely by ingesting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, . . .' *Id.* 107 S.Ct. at 2433 (emphasis in original) (Footnote omitted)'' *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d at 884 (10th Cir. 1987) at 889-90, Petition Appendix A-8.

Any decision by the Utah courts on the *Metropolitan Life* issues is subject, of course, to review.

However, even though the Tenth Circuit did not reach this issue, it is apparent that the Utah blacklisting statutes as they relate to the facts alleged in the complaint involve matters which are only peripherally concerned with federal labor law and which, while setting minimum standards for the treatment of discharged employees which apply to all workers whether or not a collective bargain-

ing agreement exists, do not alter the economic balance of power between labor and management as designed by Congress in the framework of the NLRA.

Furthermore, the blacklisting complained of in the complaint, as it is unrelated to any labor union activity, does not form a basis of an unfair labor practice as arguably protected or prohibited by Sections 7 and 8 of the NLRA. The complaint relies entirely on State of Utah policy as incorporated in its Constitution since 1896, that once a worker is discharged he is to be free from interference when seeking new employment. Indeed, with rare exceptions, blacklisting on facts such as these has become so archaic as to be of virtually no concern to national labor policy.

3. The Tenth Circuit's Decision does not Reach the Issue of Mandatory Grievance Procedures Since it Correctly Holds that the District Court is Without Removal Jurisdiction.

The Petition states that the Tenth Circuit's decision "ignores" the grievance procedure issue. However, as noted in the previous section, its failure to address that issue is based upon its decision that no removal jurisdiction exists, and that since that issue of mandatory grievance procedure is raised only as a defense, it does not overcome the well-pleaded complaint rule.

4. The Tenth Circuit's Decision is Not Controlled by Lingle v. Norge Division of Magic Chef, Inc.

Petitioner's last basis for requesting certiorari is that this case raises issues "similar" to those raised in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 226 (1987), now before

this court as No. 87-259. *Lingle* is concerned only with the issue of retaliatory discharge and mandatory grievance procedures under bargaining agreements which have "just cause" discharge provisions; and, while *Lingle* may refine the issue of Section 301 preemption, as may all cases involving a balancing of state regulations against the federal labor policy, it is unlikely that it will affect the validity of the Tenth Circuit's opinion in this blacklisting case since its decision is consistent with the well-pleaded complaint rule. *Caterpillar v. Williams,* 482 U.S. —, 96 L.Ed. 2d 318, 107 S.Ct. 2425 (1987), *Gully v. First National Bank,* 299 U.S. 109 (1936).

———o———

SUMMARY

The Tenth Circuit's decision correctly applied the well-pleaded complaint rule in determining that, on its face, the complaint relies entirely on state remedies, and, therefore, no removal jurisdiction exists; and, that any preemption issue under the NLRA is raised only as a defense to the complaint and must be addressed in the first instance by the state courts.

Respectfully submitted,

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Dated: May 6, 1988

Supreme Court, U.S.
FILED
MAY 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1690

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

BECHTEL POWER CORPORATION,
Petitioner,

VS.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 57, JAMES K. HOUSEKEEPER AND JAY E. TRINNAMAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

Petitioners Bechtel Power Corporation and Ronald Weatherred (hereunder collectively referred to as "Petitioner" or "Bechtel") hereby reply to the Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed in the above-captioned action, and supplement the Petition for Writ of Certiorari, pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, as follows:

Statement of the Case

Respondents' Statement of the Case inaccurately characterizes the nature of Respondents' complaint:

> Without reference to or reliance upon any rights granted under any labor agreement . . . Respondents filed a complaint in state court alleging only violations of state of Utah laws prohibiting such blacklisting.

(Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Response") at 3.) Respondents neglect to mention that paragraph 6 of their complaint (Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition") at E-2) explicitly refers to the work rule which is the subject of this litigation. This work rule is incorporated into the collective bargaining agreement which governs Respondents' relationship with Bechtel. Although Respondents have framed their claims under the rubric of state laws, any court adjudicating those claims would necessarily refer to and interpret the work rule which lies at the heart of this action.[1]

Respondents also mischaracterize the nature of this case. The central issue is whether section 301 of the Labor-Management Relations Act ("LMRA") 28 U.S.C. § 185, preempts Respondents' purported state law claims. This issue was the basis for the Tenth Circuit's holding and for the present Petition. By injecting sections 7 and 8 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157-158, into the discussion (Response at 3-4, 6-8), Respondents obscure the Tenth Circuit's improper failure to consider the impact of the application of the relevant Utah state laws on federal labor law and policy.

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[1] The fact that Respondents originally attempted to grieve the present dispute under the procedures provided for in the collective bargaining agreement further belies their attempt to divorce the present action from the terms of the collective bargaining agreement.

Reasons for Granting the Writ

The Tenth Circuit's holding below squarely and irreconcilably conflicts with a recent holding of the Ninth Circuit, as well as prior holdings of other circuits. The Tenth Circuit has applied the well-pleaded complaint rule too broadly by failing to recognize the clear connection between Respondents' state law action and the collective bargaining agreement, and has thereby improperly limited the scope of federal preemption under section 301. Furthermore, the Tenth Circuit erred by holding that Utah statutory and constitutional rights are "nonnegotiable" and therefore beyond the broad preemptive power of section 301.

The Tenth Circuit's Opinion Directly Conflicts With *Utility Workers of America, Local No. 246 v. Southern California Edison*

In addition to the conflicts cited in the Petition for Certiorari (Petition at 5), the Tenth Circuit's opinion conflicts directly with a Ninth Circuit case decided after the filing of the Petition, *Utility Workers of America, Local No. 246, AFL-CIO v. Southern California Edison Company*, 88 C.D.O.S. 2998, Nos. 87-5674, 87-5702 (9th Cir. May 4, 1988), in three important respects: application of the well-pleaded complaint rule, application of section 301 to state constitutional law claims and definition of "nonnegotiable state law rights." (A copy of this opinion is attached hereto as Exhibit A.)

In *Utility Workers*, the union and two individual employees contested the employer's implementation of a drug testing program. As in the present case, plaintiffs initially filed their grievance under the grievance resolution process specified in the collective bargaining agreement. In addition, the plaintiffs subsequently filed an action in state court alleging state constitutional claims, specifically alleging that drug testing violated state constitutional rights of privacy and freedom from unreasonable search and seizure. The employer removed the action to federal court. The district court, *inter alia*, dismissed plaintiffs' state law constitutional claims and plaintiffs appealed from that ruling. On appeal, the Ninth Circuit held that the employees' state constitu-

tional law claims arising out of the employer's implementation of random drug testing are preempted by section 301 of the LMRA.

Given the similarity of the procedural and legal contexts of *Utility Workers* to the present case, the Tenth Circuit's application of the well-pleaded complaint rule here (*see, e.g.*, Appendix to Petition at A-4 - A-7) clearly conflicts with the Ninth Circuit's ruling regarding section 301 preemption. Whereas the Tenth Circuit in the present case held that Respondents' state law constitutional claims "derived entirely from rights and duties created by state law," (Appendix to Petition at A-9), the Ninth Circuit in *Utility Workers* characterized the union's state law constitutional claims as "substantially dependent" upon the analysis of the management rights clause of the collective bargaining agreement. *Utility Workers*, 88 C.D.O.S. at 2999. The Ninth Circuit went on to note: "Because § 301 requires courts to create federal law, federal jurisdiction is not barred by the well-pleaded complaint rule . . . " *Id.* at 2999 n. 2. Thus a clear conflict emerges over the coverage of section 301 with respect to state constitutional claims.

The conflict between the two cases is brought into clearer focus when the nature of the collective bargaining agreements involved is considered. Since the state law claims in *Utility Workers* could not "be resolved without reference to the [management rights clause of the] collective bargaining agreement," *id.*, they were dismissed as preempted under section 301. Here, by contrast, Respondents' complaint relates directly to both a management rights clause (Petition at 3) and to Article VI of the collective bargaining agreement (Petition at 3), which specifically addresses the issue of hiring of employees at the Project. Nevertheless, the Tenth Circuit held that evaluation of Respondents' state law claims was not "inextricably intertwined" with consideration of the terms of the collective bargaining agreement.

The two opinions also conflict in their definition of "nonnegotiable state law rights." In the present case, the Tenth Circuit found that rarely-invoked statutory and state constitutional provisions regarding blacklisting, a form of restriction on employment relationships, were "nonnegotiable." In *Utility Workers*, the Ninth Circuit held that the California's far-reaching constitu-

tional rights to privacy and freedom from unreasonable search and seizure were not "nonnegotiable." The court there stated:

> [A]n employer's decision to institute a drug-testing program is a proper subject for collective bargaining. The question of drug testing obviously implicates important personal rights. To the best of our knowledge, however, no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here.

Id. It is patently inconsistent for the Tenth Circuit to find that hiring restrictions are sufficiently removed from the collective bargaining process to be "nonnegotiable" while the Ninth Circuit holds that drug testing, notwithstanding its privacy and search and seizure implications, is not a "nonnegotiable" state law right.

Utility Workers therefore conflicts with the Tenth Circuit's holding below in three important respects. First, the two courts differ over the scope and application of the well-pleaded complaint rule. Second, the two circuits reach opposite conclusions regarding the application of section 301 to state law constitutional claims. Third, the definition of "nonnegotiable state law rights" is radically different in each case. These factors demonstrate a square and irreconcilable conflict between the two circuits and illustrate the appropriateness of granting the writ in the present case.

Metropolitan Life is Relevant to the Tenth Circuit's Preemption Analysis Under Section 301

Respondents' attempt to distinguish *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), as a case arising under sections 7 and 8 of the NLRA ignores the importance of *Metropolitan Life* in the present context. *Metropolitan Life* commands that a proper analysis of federal preemption must consider the impact of state law on federal labor concerns. The fact that the Tenth Circuit did not decide the preemption question under the NLRA does not diminish its obligation to consider federal labor law and policy in deciding issues of preemption under

section 301 of the LMRA. *See, e.g., National Metalcrafters v. McNeil,* 784 F.2d 817 (7th Cir. 1986).

CONCLUSION

For the reasons asserted in the Petition and herein, a writ of certiorari should issue.

Dated: May 12, 1988

Respectfully submitted,

PHILIP R. PLACIER
Counsel of Record

APPENDIX A

Cite as 88 C.D.O.S. 2998

UTILITY WORKERS OF AMERICA, LOCAL NO. 246, AFL-CIO, et al,
Plaintiffs-Appellants, Cross-Appellees, v.-
SOUTHERN CALIFORNIA EDISON COMPANY, et al, Defendant-Appellee,
Cross-Appellants.

Nos. 87-5674, 87-5702
D.C. No. CV 86-8250
Central District of California; HUPP, District Judge
Counsel: Glenn Rothner and Adam Radinsky, Reich, Adell & Crost, for Plaintiffs-Appellants. Charles R. Kocher, John W. Evans and Mark E. Mikula, for Defendant-Appellee/Cross-Appellant.
Filed May 4, 1988

Before: GOODWIN, WALLACE and ALARCON, Circuit Judges

GOODWIN, Circuit Judge:

This case requires us to decide whether section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), preempts a union's claim that an employer's unilaterally implemented drug-testing program violates rights guaranteed by the California Constitution.

Utility Workers of America, Local 246, appeals the order dismissing its state constitutional law claims arising out of the implementation of random drug testing of employees by Southern California Edison (SCE) at its San Onofre Nuclear Generating Station. SCE cross-appeals from the district court's refusal to dismiss Local 246's breach of the collective bargaining agreement claim and from its decision to enter a preliminary injunction against random drug testing.[1]

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[1] Appellants ask us to strike portions of appellee's reply brief on the ground that these portions cover subject matter which is beyond the

In September 1984, SCE began annual drug-screen urinalysis for all employees seeking "unescorted access" into the security area encompassing the San Onofre plant's nuclear reactors. SCE instituted the drug testing requirement without prior negotiations with Local 246, the collective bargaining agent for employees at the San Onofre facility. Local 246 filed a grievance asserting that institution of the program violated the collective bargaining agreement.

Local 246 also filed a charge with the National Labor Relations Board (NLRB) alleging that SCE's unilateral implementation of the program constituted an unfair labor practice. The NLRB deferred the unfair labor practice charge to arbitration, and Local 246 failed to pursue that matter further.

Beginning about December 1, 1986, SCE modified its drug-testing program. Under the new system, plant employees—chosen at random by a computer—would be required to produce urine samples for testing on one day's notice. SCE implemented the modifications without first bargaining with Local 246.

On December 8, 1986, Local 246 filed a grievance asserting that SCE violated the collective bargaining agreement by instituting the random drug-testing program without first bargaining in good faith. Local 246 concedes that this grievance now is proceeding in accordance with the grievance-resolution mechanisms created by the collective bargaining agreement.

On December 10, 1986, Local 246 and two plant employees filed an action against SCE in state court, alleging that the drug-testing program violated rights guaranteed under the California Constitution to privacy and freedom from unreasonable searches and seizures. *See* Cal. Const. art. I, § 1 (right to privacy); *id.* art. I, § 13, (prohibition of unreasonable searches and seizures). The complaint also alleged that SCE had violated the collective

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scope of the final brief in a cross-appeal. Although we recognize that the discussion in these portions has peripheral relevance to those matters properly addressed upon cross-appeal, we grant appellants' motion to strike because appellee has had ample opportunity to discuss the claims in its opening brief.

bargaining agreement and sought injunctive and declaratory relief.

After the state court issued a temporary restraining order enjoining random drug testing, SCE removed the case to federal district court. On February 11, 1987, the district court issued an order dismissing the state constitutional claims as preempted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982). The district court also issued a preliminary injunction against implementation of random drug testing, pending resolution of the grievance. Each party has appealed from the part of the order unfavorable to it.

We review de novo the question whether section 301 preempts state law. *See Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 565 (9th Cir. 1987). We begin, as always, with the language of section 301:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .

29 U.S.C. § 185(a)(1982).

Section 301 "expresses a federal policy that the substantive law to apply in § 301 cases 'is federal law, which the courts must fashion from the policy of our national labor laws.'" *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (*quoting Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957)). The preemptive force of section 301 "is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2430 (1987) (*quoting Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542, 1547 (1987)).[2]

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[2] Because § 301 requires courts to create federal law, federal jurisdiction is not barred by the well-pleaded complaint rule, under which a defendant may remove a case based upon federal jurisdiction only where a federal question would appear on the face of the plaintiff's properly pleaded complaint. *See Gully v. First Nat'l Bank in Meridian*, 299 U.S.

Preemption of state-law claims is inappropriate where state causes of actions "confer[ ] nonnegotiable state-law rights on . . . employees independent of any right established by contract." *Allis-Chalmers*, 471 U.S. at 213. "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 220.

Local 246's constitutional claims are "substantially dependent" upon the analysis of the collective bargaining agreement and they constitute a properly negotiable subject for purposes of collective bargaining. Resolution of the issue whether Local 246 has bargained away its members' claimed constitutional rights must rest upon Articles VI and X.N of the collective bargaining agreement, which recognize SCE's right to manage the plant, to direct the working force, and to implement reasonable safety rules and require their observance. Thus, we find that Local 246's state-law claims cannot be resolved without reference to the collective bargaining agreement and that they should therefore be dismissed as preempted by section 301.

Drug testing does not implicate the sort of "nonnegotiable state-law rights" that preclude preemption under section 301. *See Allis-Chalmers*, 471 U.S. at 213. As Local 246 argued when it filed its charge of unfair labor practices in 1984, an employer's decision to institute a drug-testing program is a proper subject for collective bargaining. The question of drug testing obviously implicates important personal rights. To the best of our knowledge, however, no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here.[3]

109, 112-13 (1936). Even if state law would provide a cause of action in the absence of section 301, preemption under section 301 creates an exclusively federal cause of action. *See Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983).

[3] Our conclusion is not altered by the recent decisions in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), or the companion cases of *Brotherhood of Locomotive Eng'rs v. Burlington N.*

We reject Local 246's argument that *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862-63 (9th Cir. 1987), petition for cert. filed Nov. 25, 1987, mandates a finding that its claims are not preempted by section 301. The *Paige* court, in holding that section 301 did not preempt a tort action based upon California's OSHA regulations, found that a private right of action was created to enforce this state regulatory scheme, not to regulate the employment relationship. *See id.* at 863. Thus the court held that this private right of action "exists independent of any contractual right." *Id.* Here, however, the constitutional rights claimed by Local 246 pose a "significant threat to the collective bargaining process" and promote no "state interest in protecting the public transcending the employment relationship." *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1001-02 (9th Cir. 1987) (interpreting *Paige*). *Paige* therefore is inapplicable to this case.

We also find inapposite our recent decision in *Tellez v. Pacific Gas and Elec. Co.*, 817 F.2d 536, 539-40 (9th Cir.), *cert. denied*, 108 S.Ct. 251 (1987). *Tellez* held that section 301 does not preempt claims alleging intentional and negligent infliction of emotional distress where the collective bargaining agreement "is silent on working conditions, and vague on disciplinary formalities" so that "examination or interpretation of the agreement would not help to resolve [plaintiff's] claim." *Id.* at 539. Here, by

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R.R. Co. 838 F.2d 1087 (9th Cir. 1988), and 838 F.2d 1102, *petition for cert. filed* 56 U.S.L.W. 3720 (April 1, 1988) (9th Cir. 1988) although *Burnley's* holding that drug testing of railway employees violated the fourth amendment suggests the importance of the rights asserted here, *see Burnley*, 839 F.2d at 579-82, this determination in no way suggests that such rights are nonnegotiable; the prevalence of collective bargaining agreements authorizing searches of employees' possessions strongly suggests that drug testing provisions would be negotiable. The panel's finding in the two *Burlington Northern* cases that the dispute was major rested not upon the importance of the issue but upon the fact that the issue was "neither contemplated nor arguably covered" by a collective bargaining agreement. *Burlington Northern*, at 1091 (*quoting International Ass'n of Machinists v. Aloha Airlines, Inc.* 776 F.2d 812, 816 (9th Cir. 1985)). These recent cases therefore do not hold that nonnegotiable constitutional rights preclude unions from bargaining over drug testing programs.

contrast, we have found it necessary to examine the collective bargaining agreement to determine whether it has been breached.

We reach the same result as the other courts that have considered the question whether section 301 preempts state-law claims brought to seek invalidation of an employer's drug-testing program, including those founded on state privacy claims. *See Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256 (4th Cir. 1987); *Strachan v. Union Oil Co.*, 768 F.2d 703, 704-06 (5th Cir. 1985); *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F.Supp. 183, 186-87 (D. Or. 1986). Although these cases involved state tort claims rather than state constitutional claims, the Supremacy Clause declares the primacy of federal law over state constitutional provisions as well as over state common and statutory law. *See* U.S. Const. art. VI, cl. 2.

We therefore affirm the district court's finding that section 301 preempts Local 246's state-law challenges to SCE's drug testing program, notwithstanding that its claims are based on rights guaranteed under the California Constitution. This holding makes it unnecessary for us to consider SCE's claims that Local 246's state-law claims are preempted because the San Onofre plant is located on a federal enclave or because the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1982 & Supp. III 1985), grants exclusive legislative power over the facility to the federal government.

The district court held that it had concurrent jurisdiction with the NLRB over Local 246's claim that SCE breached the collective bargaining agreement by instituting a unilateral change in terms and conditions of employment and by refusing to bargain over such changes. The misconduct alleged by Local 246 also would constitute unfair labor practices in violation of sections 8(a)(1) and 8(a)(5) of the NLRA.[4] *See* 29 U.S.C. § 158(a)(1)

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[4] On September 8, 1987, the NLRB's Office of the General Counsel recommended that drug testing for current employees and job applicants be deemed a mandatory subject of bargaining under section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982). *See* Office of the General Counsel to the National Labor Relations Board, Memorandum GC 87-5 (Sept. 8, 1987). Because we find that federal courts lack jurisdiction at this

(1982); 29 U.S.C. § 158(a)(5) (1982). Indeed, Local 246's claim for breach of contract is based upon SCE's alleged violation of Article I of the collective bargaining agreement, which provided that "[t]he Company agrees to recognize the rights of employees as set forth in Section 7 of the National Labor Relations Act."

"When an activity is arguably subject to § 7 or § 8 of the Act, . . . federal courts must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959). However, district courts have concurrent jurisdiction with the Board in cases where an alleged unfair labor practice also violates a collective bargaining agreement. *See Smith v. Evening News Ass'n,* 371 U.S. 195, 197 (1962).

We find it unnecessary to determine whether the NLRA preempts Local 246's claims. "The usual rule in the field of labor law is that where administrative procedures have been instituted for the resolution of disputes between parties to a collectively bargained or other agreement, the courts will generally require the exhaustion of those procedures before exercising the jurisdiction they might otherwise have over disputes subject to resolution through said procedures." *Amato v. Bernard,* 618 F.2d 559, 566 (9th Cir. 1980).

Federal labor policy places great weight upon ensuring the availability of grievance procedures as "a uniform and exclusive method for orderly settlement of employee grievances." *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 653 (1965). "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581 (1960). "A

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time to determine whether SCE has violated the collective bargaining agreement, we need not consider the issues whether the General Counsel's recommendation should be applied retroactively or whether SCE's existing drug-testing program permitted it to modify the program without bargaining.

rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Allis-Chalmers,* 471 U.S. at 220.

Because Local 246 has not complied with available grievance procedures, the district court could not hear the union's claim for breach of the collective bargaining agreement even if it shares jurisdiction with the NLRB. Accordingly, we reverse the part of the district court's order declining to dismiss Local 246's claim for breach of contract.

We affirm the part of the district court's order dismissing Local 246's claims that SCE's drug-testing program violates the California Constitution because the state causes of action are preempted by section 301. We reverse the part of the district court's order finding federal jurisdiction over Local 246's claims for breach of contract because Local 246 has failed to exhaust available grievance procedures. The district court lacked jurisdiction over the case and therefore has no power to issue a preliminary injunction against SCE's drug testing. The case is remanded to the district court with instructions to dissolve the preliminary injunction pending resolution of the dispute through the grievance process.

AFFIRMED in part, REVERSED in part, and REMANDED.